

INSTITUTIONAL AND LEGAL DEVELOPMENT OF EAEU AND EU IN COMPARATIVE PERSPECTIVE

MARK ENTIN,

MGIMO University (Moscow, Russia)

VADIM VOYNIKOV,

Immanuel Kant Baltic Federal University (Kaliningrad, Russia)

<https://doi.org/10.17589/2309-8678-2019-7-3-155-168>

Despite the relatively short history of its development, the Eurasian Economic Union (EAEU) is becoming more confident about itself as a successful integration project. At the same time, there is a growing interest in the EAEU by the political elite and scientific community in Russia and abroad. The EAEU is investigated from different points of view, but almost no research is carried out without a comparative legal analysis of the EAEU and the European Union (EU). Both unions belong to the same type of integration organizations; the EAEU was largely created in the image of the EU. However, an analysis of the institutional and legal structure of the EAEU and the EU shows there are fundamental differences between the two unions concerning the principles of their functioning. This article substantiates the fact that supranational constitutionalization within the EU is not typical for the EAEU and is even harmful. At the same time, the technical tools developed by the EU can be useful to the EAEU for resolving current challenges of ensuring sustainability and self-affirmation in the international arena. This experience is of importance in view of the crisis experienced by the EU, since only they were able to manifest what institutional and legal decisions are working within the framework of an integration association, and which should be discarded. It is vital that the EAEU not repeat the mistakes and miscalculations of the EU.

Keywords: EAEU; EU law; Eurasian integration; reception of law; institutional and legal construction; supranational legislation and rule-making.

Recommended citation: Mark Entin & Vadim Voynikov, *Institutional and Legal Development of EAEU and EU in Comparative Perspective*, 7(3) Russian Law Journal 155–168 (2019).



Table of Contents

Introduction

1. The Concept of Supranational Constitutionalization

2. Prospects for Further Development of Constitutionalization Within the EU

3. The Institutional and Legal Construction of the EAEU

4. Theoretical and Practical Aspects of Using the EU Experience in the Framework of the EAEU and Its Institutional and Legal Construction

Conclusion

Introduction

The creation of the Eurasian Economic Union (EAEU) is a key result of the diverse integration processes in the post-Soviet area after the collapse of the Soviet Union.¹ The EAEU has embraced many features of the European Union (EU). The EAEU is a supranational organization (community). Legal regulation on most issues within the EAEU is carried out just as within the EU through supranational mechanisms.² In fact, the EAEU belongs to the same group of integration organizations as the EU. However, there are fundamental differences between the EAEU and the EU, not only related to the different levels of competence of each. These differences are manifested in the peculiarities of the institutional and legal structure of these organizations. As noted by Roman Petrov and Paul Kalinichenko, the EAEU is not a symmetric reflection of the EU.³

Traditionally, constitutional construction is confined to national boundaries. However, with the strengthening and extension of integration processes, constitutional construction has reached the supranational level. Thus, the term “supranational constitutionalization” has appeared in the legal lexicon.

Under these conditions, all countries participating in regional integration processes are obliged to decide for themselves how to deal with the challenges of

¹ Капустин А.А. Договор о Евразийском экономическом союзе – новая страница правового развития евразийской интеграции // Журнал российского права. 2014. № 12. С. 98–107 [Anatoly Ya. Kapustin, *Treaty on Eurasian Economic Union – New Page of Legal Development of Eurasian Integration*, 12 Journal of Russian Law 98 (2014)].

² Нешатаева Т.Н. Интеграция и наднационализм // Вестник Пермского университета. Юридические науки. 2014. № 2. С. 243–248 [Tatyana N. Neshataeva, *Integration and Supranationalism*, 2 Perm University Herald. Juridical Sciences 243 (2014)].

³ Roman Petrov & Paul Kalinichenko, *On Similarities and Differences of the European Union and Eurasian Economic Union Legal Orders: Is There the “Eurasian Economic Union Acquis”?*, 43(3) Legal Issues of Economic Integration 295 (2016).



supranational constitutionalization. Is it a miracle or does it enhance risks? Should the relationship between national and community law be changed in a different way than with respect to classical international law?⁴

In the EU, supranational constitutionalization has occurred,⁵ even going so far as to cause rejection in politics and legal theory.⁶ On the contrary, constitutionalization is not characteristic of the EAEU. Moreover, at the current stage of development of Eurasian integration, constitutionalization in the forms adopted in the EU would be harmful for the EAEU, unnecessary, and premature.

Within the framework of this article, the authors undertake a comparative legal analysis of the foundations of the political and legal structures of the EU and the EAEU, identify their key features, and identify the essence of supranational constitutionalization. One task is to determine how EU experience can be useful for the EAEU.

1. The Concept of Supranational Constitutionalization

Legal theory does not provide an established or even holistic definition of supranational constitutionalization or supranational constitutionalism. It concentrates primarily on the description of its main features.⁷ At the same time, it is difficult to derive a general definition of constitutionalization. We shall try to identify the essence of supranational constitutionalization through the prism of EU law. For it is within the framework of European integration that supranational constitutionalization has reached its highest value.

According to Alexey Ispolinov, "constitutionalization" in relation to European law means

the transformation of the EU from a traditional international organization operating on the basis of the norms of international law into a special entity that has its constitutional principles and is governed by a treaty that has the character of a constitution.⁸

⁴ See *European Union Law* (C. Barnard & S. Peers (eds.), 2nd ed., Oxford: Oxford University Press, 2017); Trevor C. Hartley, *The Foundations of European Union Law* (7th ed., Oxford: Oxford University Press, 2010).

⁵ Кашкин С.Ю. Конституционализация европейского права в свете Лиссабонского договора [Sergey Yu. Kashkin, *The Constitutionalization of European Law in the Light of the Lisbon Treaty*] (Jun. 19, 2019), available at http://elib.bsui.by/bitstream/123456789/41403/1/18_%D0%BA%D0%B0%D1%88%D0%BA%D0%B8%D0%BD.pdf.

⁶ Including Brexit, Euro-skepticism, concepts and demands for the return to the national level of all or part of the powers delegated to the EU.

⁷ Berthold Rittberger & Frank Schimmelfennig, *The Constitutionalization of the European Union: Explaining the Parliamentarization and Institutionalization of Human Rights*, IHS Working Paper No. 104 (May 2005) (Jun. 19, 2019), available at https://www.ihs.ac.at/publications/pol/pw_104.pdf.

⁸ Исполинов А.С. Приоритет права Европейского союза и национальная (конституционная) идентичность в решениях суда ЕС и конституционных судов государств – членов ЕС // Сравнительное

Rittberger and Schimmelfennig consider constitutionalization through the lens of strengthening the role of the European Parliament and the institutionalization of basic human rights at the EU level.⁹ Pernice notes that constitutionalism not only distinguishes the EU from other international organizations, it acts as the basis for the functioning of the entire Union from the domestic market to criminal law. According to Pernice,

constitutionalism was even strengthened by the Lisbon Treaty giving the Charter of Fundamental Rights the same legal value as primary law, abolishing the pillar structure and extending the direct effect of European legislation as well as judicial review to measures regarding criminal law, providing for democratic principles, a citizens' initiative, strengthening the European Parliament and giving the national parliaments an institutional role and responsibility in the legislative process.¹⁰

Thus, it can be concluded that constitutionalization consists primarily in the construction of the law and the institutional system of an integration entity according to the model of a federal State. In other words, supranational constitutionalization is a special kind of institutional and legal structure of an integration entity that brings it as close as possible to State-building.

In the process of constitutionalization of the EU, several stages can be distinguished. The EU was created as an international organization that was subsequently largely constitutionalized.¹¹ The first stage is the federalization of EU law. Initially, an integration organization is created using the classical methods of international law. However, it is quickly separated from international and national law.¹² The legal system created in the course of the functioning and evolution of the EU is becoming an independent legal system. As a result, it acquires all those fundamental characteristics without which it is now inconceivable. These characteristics include the integration of EU law into the legal system of the member States, the supremacy

конституционное обозрение. 2017. № 4. С. 47–68 [Alexey S. Ispolinov, *The Priority of European Union Law and National (Constitutional) Identity in Decisions of the EU Court and the Constitutional Courts of the EU Member States*, 4 Comparative Constitutional Review 47 (2017)].

⁹ Rittberger & Schimmelfennig, *supra* note 7.

¹⁰ Ingolf Pernice, *Does Europe Need a Constitution? Achievements and Challenges After Lisbon in A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* 75 (A. Arnulf et al. (eds.), Oxford: Hart Publishing, 2011).

¹¹ Katja S. Ziegler, *The Relationship Between EU Law and International Law in A Companion to European Union Law and International Law* 42 (D. Patterson & A. Södersten (eds.), Oxford; Malden: Wiley-Blackwell, 2016).

¹² Энтин Л.М. Право Европейского Союза. Новый этап эволюции: 2009–2017 годы [Lev M. Entin, *European Union Law. New Stage of Evolution: 2009–2017*] 304 (Moscow: Aksiom, 2009).



of EU law over national law, direct operation and jurisdictional protection with all the cumulative power of national judicial bodies, the EU judicial system itself. Instrumentally, these characteristics were committed to European law by the EU Court of Justice, which formulated the concept of autonomy of the Union and its legal system.¹³

During the second stage, the EU is given such broad powers that virtually all matters governing the vital activity of a modern State are within its jurisdiction: from trade regulation to police and judicial cooperation, from environmental protection to foreign policy coordination. Naturally, these powers differ in their legal nature. In some cases, the EU is vested with exclusive competence, in others – shared, in the third – supporting.

Simultaneously, there is a changeover of the institutional system of the integration association. It acquires features that bring it closer to the structure of a modern democratic State. The EU does not lose the character of a union of States. In other words, the EU becomes an international *sui generis* organization.¹⁴

It is becoming more difficult for a Member State to promote and defend its interests which are against the interests of the majority. As a result, there is a lack of democracy on the level of Member States which cannot be compensated for by the supranational one. Although most Western researchers do everything possible to prove that democracy in the EU cannot suffer, on the contrary, this lack of democracy is intensifying at all levels.¹⁵

Given the diversity of cultures, traditions and historical heritage, the need to respect which the EU could not fail to recognize, it was unable to advance in the formation of a genuine European identity. But it created a legal palliative that became the essence of the ideology (symbol of faith) of the EU – a set of common values built into the political and legal basis of the Union. These include the rule of law, pluralistic democracy, and the protection of human rights. Since then, this set has been proclaimed as a distinctive feature of European society and belonging to this society of EU citizens, a universal criterion that all other nations must meet, and a measure of EU relations with third countries.

The specificity of the third stage lies in an attempt to give the EU the character of a society built on the basis of a single constitution. To this end, it was decided to organize a Convention to develop a Constitution for Europe. The Convention prepared the text, which includes all the attributes that would impart to the integration project a completely different sound. It implicitly uses the terminology

¹³ Marcus Klamert, *The Autonomy of the EU (and of EU Law): Through the Kaleidoscope*, 42(6) European Law Review 815, 815 (2017).

¹⁴ Jan Klabbbers, *Sui Generis? The European Union as an International Organization in A Companion to European Union Law and International Law*, *supra* note 11, at 1, 3.

¹⁵ Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23(2) European Journal of International Law 335 (2012).



of national statehood, including such concepts as laws, the Minister for Foreign Affairs, and so on. When the ratification process of the draft EU Constitution came to a standstill, the EU accepted a similar text in the form of the Lisbon Treaty, excluding from it the attributes that frightened everyone.¹⁶

Formally, the process of constitutionalization of the EU was interrupted. The prospect of its renewal is not visible. In fact, moving somewhere else along the path of constitutionalization of the EU is not necessary. The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), in conjunction with the Charter of Fundamental Rights, made an integral part of the treaties, are the EU Constitution. They possess the highest power in the hierarchy of legal acts of the EU and the Member States. All and any external EU agreements must comply with them. The norms of international law and, after the rulings of the EU Court of Justice in the *Kadi* case,¹⁷ the decisions of the United Nations Security Council are applied on the territory of the EU only if they do not violate the internal legal order of the EU.

2. Prospects for Further Development of Constitutionalization Within the EU

Constitutionalization within the EU is not a linear process. It follows the formula “one step back and two steps forward.” The processes that apologists of integration present as undoubted progress often are replaced by obvious regression.

The exit of the United Kingdom from the EU (Brexit) can be assessed variously: in terms of political, economic, and social expediency, as well as the legality of the decision itself, which was not supported by the absolute majority of the population. In addition, Brexit can be considered from the point of view of the professionalism of the negotiations, in which the British side frankly failed; the integrity of the position taken by the rest of the Member States and the Brussels bureaucracy, one of whose aims was to punish the United Kingdom as far as possible; the quality of the agreements reached between United Kingdom leaving the EU and those remaining which were enshrined in the exit treaty and declaration and which do not give any certainty as to under what conditions the United Kingdom will withdraw from the EU, if it actually happens. But with regard to the constitutionalization of the EU, it is clear that Brexit dealt a significant blow, showing the existence of serious problems.

An unexpected blow to supranational constitutionalization came from the EU eastern flank. In this case, we are talking about the unwillingness of the Visegrad

¹⁶ Kashkin, *supra* note 5.

¹⁷ Исполинов А.С. Суд Европейского союза, Яссин Кади и статья 103 Устава ООН // Российский юридический журнал. 2013. № 6. С. 27–35 [Alexey S. Ispolinov, *European Court of Justice, Yassin Kadi and Article 103 of the UN Charter*, 6 Russian Juridical Journal 27 (2013)].



Group countries to follow the principle of solidarity, which serves as the legal basis for the entire rule of law of the Union, as well as the fundamental principle of European unity.¹⁸ The principle of solidarity can be qualified as a key principle of EU law,¹⁹ and at the same time as one of the major fundamental values of European integration.²⁰

In the context of the migration crisis, which revealed systemic shortcomings in the field of border management at the national and European Union levels, the Visegrad States showed an unwillingness to sacrifice their own interests for the sake of finding a common solution. Such an attitude to the problem of immigrants seeking asylum is a feature of the population of many EU countries.²¹ However, at the governmental level, this position is actively supported mainly by the Visegrad countries. According to Murray and Longo, this reaction of the Member States is unprecedented in nature and degree, for it represents not only disagreement with the majority, but also direct opposition to the authority and legal system of the EU.²²

This position is categorically unacceptable for the EU not only because the Visegrad countries refused to perform the obligatory acts of the Union, but because it concerns civilizational matters – the most important, without which constitutionalization loses its core and main content. In this regard, the violation of the principle of solidarity by Eastern European countries was no less serious a challenge for the EU than the announcement of the withdrawal of Great Britain.

3. The Institutional and Legal Construction of the EAEU

In accordance with Article 1 of the Treaty on the EAEU,²³ the Union is an integration organization, ensuring free movement of goods, services, capital and labour within its borders, as well as coordinated, agreed or common policy in the economic sectors determined under the Treaty. Thus, the basis of the EAEU is the internal market (Arts. 4, 28 of the Treaty on the EAEU). The current version of the treaty on the EAEU does not provide for political cooperation in the field of security, foreign policy,

¹⁸ Alexandra Pimor, *Solidarity Was a Founding Principle of European Unity – It Must Remain So*, The Conversation, 24 March 2017 (Jun. 19, 2019), available at <http://theconversation.com/solidarity-was-a-founding-principle-of-european-unity-it-must-remain-so-74580>.

¹⁹ Koen Lenaerts & Jose A. Gutiérrez-Fons, *The Role of General Principles of EU Law in A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, *supra* note 10, at 179.

²⁰ Andrea Sangiovanni, *Solidarity in the European Union*, 33(2) Oxford Journal of Legal Studies 213 (2013).

²¹ Sandra Lavenex, *"Failing Forward" Towards Which Europe? Organized Hypocrisy in the Common European Asylum System*, 56(5) JCMS: Journal of Common Market Studies 1195 (2018).

²² Philomena Murray & Michael Longo, *Europe's Wicked Legitimacy Crisis: The Case of Refugees*, 40(4) Journal of European Integration 411 (2018).

²³ Договор о Евразийском экономическом союзе [Treaty on the Eurasian Economic Union] (Jun. 19, 2019), available at <http://www.eurasiancommission.org/ru/Lists/EECDocs/635375701449140007.pdf>.



migration, and other areas. However, this does not exclude the possibility of future expansion of EAEU competence to the political sphere because the development of any integration sooner or later implies a political rapprochement.²⁴ In other words, the deepening of economic integration inevitably leads to the development of cooperation in other areas.

As noted above, the EAEU as well as the EU is a supranational organization; however, the degree of supranationality in the EAEU is significantly lower than in the EU.²⁵ This is expressed in the absence of a costly international bureaucracy, which actually realizes its competence independently of the member States. In general, supranationality in the form in which it developed in the EU was not widely adopted in regional integration organizations.²⁶ The founding States of the EAEU rightly considered that for the successful achievement of the stated goals all this is not necessary. Moreover, the EAEU was positioned as an integration organization, the creation of which took into account both positive and negative EU experience. Thus, the development of the EAEU must be of a purely programmed nature, excluding the surprises that the EU countries were confronted with. The founders of the EAEU deliberately abandoned a number of features of the EU, trying to create a more flexible organization, involving the formation of an attractive economic space, but without unifying the political regimes.

The EAEU was originally created as a Union of States with incomparably different political and economic potential. However, this circumstance did not prevent the formal equality and equal weight of the Member States. First, at all levels of decision-making each Member State has the same number of votes, regardless of the size of a country and its role in integration processes. Second, each Member State has freedom of action in building economic relations with third countries.²⁷ For EU countries this is impossible.

The EAEU took the path of creating a lightweight version of an institutional structure. In general, the institutional structure of the EAEU repeats the main features of the corresponding EU structure, but in the EAEU it is more of an intergovernmental nature and, accordingly, contains fewer branches than in the EU. Moreover, in the institutional structure of the EAEU there is no parliamentary body that would represent

²⁴ Соколова Н.А. Евразийский экономический союз: правовая природа и природа права // *Lex Russica*. 2017. № 11. С. 47–57 [Natalia A. Sokolova, *Eurasian Economic Union: Legal Nature and Nature of Law*, 11 *Lex Russica* 47 (2017)].

²⁵ Petrov & Kalinichenko 2016.

²⁶ Стрежнева М.В. Наднациональность и принцип субсидиарности в ЕС и за его пределами // *Мировая экономика и международные отношения*. 2016. № 6. С. 5–14 [Marina V. Strezhneva, *Supranationality and the Principle of Subsidiarity in the EU and Beyond*, 6 *World Economy and International Relations* 5 (2016)].

²⁷ Афонцев С. Новый регионализм // *Постнаука*. 29 мая 2014 г. [Sergey Afontsev, *New Regionalism*, *Postnauka*, 29 May 2014] (Jun. 19, 2019), available at <https://postnauka.ru/longreads/26527>.



the interests of the peoples of the Union. This feature of the EU constitutionalization is absent. At this stage of integration, it was considered inappropriate.

But it does not exclude the possible creation of the Eurasian parliament in the future. One possible option would be the establishment of the EAEU Parliamentary folk *veche*, where debates can be held and the problems of integration, social cohesion, protection of traditional values, and making the EAEU more stable, efficient, and competitive can be widely discussed. The tribune of the Parliamentary folk *veche* would diversify political life within the framework of the EAEU. It will help citizens to feel that they also have representatives in the EAEU expressing their interests. It will allow them to connect to the discussions that will be conducted on this new and open to all political platform. In the future, this will provide an opportunity to find individual elements of a common identity, the formation of which is so necessary for the success of the integration process.

Another sign of constitutionalization in the EU is the existence of its own set of human rights. This feature is not characteristic of the EAEU. The issue of human rights has not been reflected in the competence of the EAEU, it is completely the responsibility of Member States. Moreover, the agreement on the EAEU is devoid of the ideological content of the EU, which concerns the obligatory observance of common values. The EAEU does not proclaim common values as the basis of its institutional and legal system.

The EAEU has its own legal basis, which designated as “Union law” (Art. 6 of the Treaty on the EAEU). However, this provision does not fully correspond to its promising title.²⁸ In fact, Article 6 of the Treaty on the EAEU describes the system of legal acts of the Union, which are clearly structured, but, unlike the EU, it does not have the characteristics inherent in national legislation. Thus, the EAEU lacks State attributes. The concept of federalization is alien to it. The evolution of the EAEU cannot and should not lead to the transformation of the Union into a federal State.²⁹

4. Theoretical and Practical Aspects of Using the EU Experience in the Framework of the EAEU and Its Institutional and Legal Construction

At the moment, the role and importance of the EU is declining in the domain of political and legal construction. At some point, the EU has evolved from a “teacher” and “role model” into a “weak link in world politics and economics.” The EU has become

²⁸ Капустин А.Я. Право Евразийского экономического союза: международно-правовой дискурс // Журнал российского права. 2015. № 11. С. 59–69 [Anatoly Ya. Kapustin, *Law of the Eurasian Economic Union: International Legal Discourse*, 11 Journal of Russian Law 59 (2015)].

²⁹ Нешатаева Т.Н. К вопросу о создании Евразийского союза: интеграция и наднационализм // Закон. 2014. № 6. С. 106–119 [Tatyana N. Neshataeva, *The Creation of the Eurasian Union: Integration and Supranationalism*, 6 Law 106 (2014)].



an organization that has to prove constantly its usefulness to Member States, elites, and societies.³⁰ Too many objective and man-made crises were encountered. As soon as the EU overcame the previous one, a new one emerged. External observers began to conclude that the former maxim, according to which the EU gains strength from any crisis overcome, has ceased to work.³¹

Previously, everyone looked at the EU, admiring its successes, and did not see it. Most reports and studies on the EU were glamorous. The EU actually encouraged assessments bordering on self-glorification. The situation has changed dramatically, and experts began to study not only its accomplishments, but also mistakes, omissions, and inherent weaknesses. Accordingly, it became possible to judge European integration in an objective manner, dissecting it from different angles, without excesses and mythologization.

Nevertheless, EU experience is extremely important for Russia and for the development of Eurasian integration. Positive experience will allow using all the best that has been created in the EU and negative experience will make it possible to avoid repeating EU mistakes caused by the unjustified deepening of integration. This experience is necessary to make the Eurasian integration project more successful and sustainable, to avoid predictable mistakes, and to use certain solutions that proved their viability. After all, the Eurasian integration project has embraced many features of the EU. If the EU fails, this could be a disaster for the EAEU. In any case, it will be impossible to retain the EAEU in its current forms. Studying EU experience is likewise necessary for understanding how to build relations between the EAEU and the EU in the future.³²

The study and use of EU experience should not be approached superficially. The process of borrowing legal progress must be selective. It is necessary to study the experience of the EU systematically and creatively and to take for own development only what is needed.³³

EU experience in the field of institutional and political development should be used with extreme caution. The EAEU has its own logic of existence and development, which differs from the corresponding logic of the EU. The EU has as its goal the formation

³⁰ Кавешников Н.Ю. Институционально-политическое развитие ЕС: кризис и варианты трансформации // Мировая экономика и международные отношения. 2017. № 5. С. 14 [Nikolay Yu. Kaveshnikov, *Institutional and Political Development of the EU: Crisis and Transformation Options*, 5 *World Economy and International Relations* 14 (2017)].

³¹ Энтин М.Л., Энтина Е.Г., Тнэлм Н.И. В поисках партнерских отношений VII: Россия и Европейский Союз в 2017 – первой половине 2018 годов: Научная монография [Mark L. Entin et al., *In Search of Partnership VII: Russia and the European Union in 2017 – the First Half of 2018: Scientific Monograph*] (Moscow: Zebra-E, 2018).

³² Olga Potemkina, *European Union – Eurasian Economic Union: Potential for Cooperation in The EU – Russia: The Way out or the Way Down?* 40 (O. Potemkina (ed.), Moscow: Institute of Europe, Russian Academy of Sciences; Egmont – The Royal Institute for International Relations, 2018).

³³ Entin et al. 2018.



of a more cohesive union of the peoples of Europe (Art. 1 of the TEU), subordinated to common ideological guidelines. Based on Article 4 of the Treaty on the EAEU, the objectives of the Eurasian Union are: to create proper conditions for the sustainable economic development of the Member States in order to improve the living standards of their populations, to create a single market for goods, services, capital and labour within the Union, and to ensure comprehensive modernization, cooperation, and competitiveness of national economies in the global economy. The history of the development of the EU shows it confidently moving towards the formation of a “super-state.” For the EAEU countries, the “super State” is a passed stage, so their task is to use the previous experience of coexistence within the USSR to create a new mechanism of economic interaction, devoid of ideological and political pressure. Therefore, regarding the EAEU as an attempt to recreate the USSR is incorrect.


As noted above, further political rapprochement of the EAEU member States is a possible option. However, political rapprochement should act as a mechanism to ensure the functioning of an economic union. In any case, political cooperation should not prevail over economic, which is what has happened in the EU. In this regard, the use of EU legal experience within the framework of the EAEU should primarily concern the substantive part of the law and only partially relate to the institutional one. The EU experience, both positive and negative, if freed from ideological overlays and the unnecessary, contra-indicated to EAEU goal-setting, would be useful for a reasonable, pragmatic, and simultaneously accelerated implementation of the Eurasian integration project. From this point of view, the matrix of actions to achieve the above mentioned objectives could be presented as follows.

(1) *Further elimination of existing barriers and leveling the legal status of individuals and juridical persons across the Union.* This is especially true of labour migration. The Treaty on the EAEU contains all the necessary provisions to ensure the free movement of workers, which is an integral part of the Eurasian integration project. This is clearly stated in the Advisory Opinion of the Court of the EAEU of 7 December 2018, in which the Court noted that

[t]he systemic interpretation of Articles 2, 28 of the Treaty on the EAEU allows us to conclude that the free movement of persons is one of the elements of the functioning of the internal market.³⁴

There are many factors which hinder the progressive development of economic cooperation. Discrimination on the basis of nationality is overt. And there is no general legal regulation providing a solution to the specific problems impeding free movement. Under these conditions, the organs of the Union, as well as Member States, should continue to work to remove all barriers to the free movement of persons.

³⁴ Консультативное заключение Суда ЕАЭС от 7 декабря 2018 г. [Advisory Opinion of the Court of the EAEU of 7 December 2018] (Jun. 19, 2019), available at <http://www.courteurasian.org/doc-22543>.



The EAEU Member States should return to discussing the possibility of forming a harmonized or coordinated policy in the migration sphere, abandoning the quota system for migrants, simplifying all procedures for the implementation of the right to work and access to the labour market, creating taxation mechanisms, and social and pension benefits that would follow a person moving to another EAEU country. In turn, the EAEU political organs and the Court of the EAEU should always explain how the national regime pertaining to the legal status of an individual should be applied in practice and demonstrate what it represents in each specific situation. In this regard the above-mentioned Advisory Opinion on the Eurasian Economic Commission (EEC) application for clarification of Articles 1 and 97(2) of the Treaty on the EAEU in connection with the alleged “violation of the rights of professional athletes – citizens of the Republic of Armenia while they are working in professional sports clubs of the Russian Federation” is a significant advance in the right direction.

(2) Special attention should be paid to the *issue of ensuring the observance of human rights in the implementation of the legislative process* within the EAEU. Human rights are not mentioned in the Treaty on the EAEU. However, the imperative of their observance is enshrined in the Constitutions of Member States and international treaties. In this respect it would be important to invite the Court of the EAEU to clearly speak out about the place and role of human rights in the EAEU legal system.

(3) *Deepening law enforcement cooperation.* The development of cooperation in the fight against crime is an essential condition for the effective activity of any integration community, regardless of whether it has the appropriate powers, because at the national level, the law enforcement system of any State does not have the necessary competence and administrative resources to independently solve the problem of combating crime for which national borders do not exist.³⁵

Cooperation in the fight against crime among the EAEU Member States is carried out outside the legal framework of the Union. Such cooperation should be developed in order to protect more effectively the interests of Member States related to their participation in the EAEU. In the future, such cooperation may be integrated into the legal system of the EAEU.

(4) It is necessary to develop a clear position on *the ratio of legal norms of the EAEU and Member States*. On this issue, the Treaty on the EAEU does not contain unambiguous provisions. On one hand, it is not clearly spelled out, in contrast to the hierarchy of legal acts constituting Union law (Art. 6(4) of the Treaty on the EAEU). On the other hand, supranational integration presupposes the primacy of the jointly developed and adopted supranational law over national law and its separation from both general international and national law.

³⁵ Волеводз А.Г. Построение Евразийского союза потребует создания новых механизмов для противодействия «интеграционной» преступности или нам нужен ЕВРАЗПОЛ // Viperson.ru. 12 октября 2011 г. [Alexander G. Volevodz, *The Construction of the Eurasian Union Will Require the Creation of New Mechanisms to Counter the “Integration” of Crime, or We Need EVRAZPOL*, Viperson.ru, 12 October 2011] (Jun. 19, 2019), available at <https://mgimo.ru/upload/iblock/a56/a56e5d67938efc68ac84ce5fb46f819c.pdf>.



In addition, supranational legislative and executive decisions of the EEC will actually have a direct effect in the internal law of the Member States, as the Treaty prescribes, only if they prevail over the national legal provisions that contradict or diverge from them. Therefore, the political bodies of the EAEU should in due course consider it expedient to speak on this matter, adding the political and legal significance to certain most valuable derivative legal acts of the EAEU, backing them up with their authority, and supporting breakthrough decisions and advisory opinions of the EAEU Court. The latter, which certainly should be given merit, has already begun to interpret the law of the EAEU as a separate legal system, the norms of which prevail, have direct effect, and are subject to jurisdictional protection in all Member States.

(5) *Strengthening the role of the EEC* as a guarantor of founding Treaty. In the future, the EAEU Member States will need to recognize for the EEC the authority to supervise compliance by all Member States, business entities, and national bureaucracy with the legal provisions of the EAEU. This will give the institutional structure of the EAEU the necessary flexibility and stability: direct conflicts between Member States will become a thing of the past – they will be mediated by the EEC.

The measures indicated above will make it possible in the medium term to increase the efficiency of the EAEU as an international organization of regional economic integration, without significant interference in the sphere of State sovereignty of its members. Thus, the EAEU will be able to carry out the tasks assigned to it, without being distracted by political games.

Conclusion

The EU and the EAEU are two large integration organizations based on similar principles, but with different experience, political weight, and different approaches to certain political issues in the world.

Moreover, both Unions perceive each other differently. For the EAEU, the European Union is an authoritative integration organization with which it is advisable to build partnerships and which is a source of invaluable experience. For the EU, the Eurasian Economic Union is a newcomer to integration processes and often seen as an attempt to recreate the USSR. At the same time, the EU admits the possibility of establishing formal relations with the EAEU under certain conditions; however, building a full-fledged partnership at the current stage is not being considered. Nevertheless, despite the negative perception of the EAEU by the EU, interest in Eurasian integration processes in the EU countries is increasing every year.

The EAEU and the EU have the potential to develop cooperation, but at the moment this potential has not been realized³⁶ because of political differences caused, *inter alia*, by excessive ideological obstinacy and constitutionalization of the EU.

³⁶ Peter Van Elsuwege, *Overcoming Legal Incompatibilities and Political Distrust: The Challenging Relationship Between the European Union and the Eurasian Economic Union in The EU – Russia: The Way out or the Way Down?*, *supra* note 32, at 34.



Since its creation, the EAEU has actively used the EU experience for the development of the founding Treaty and formation of its own regulatory framework. At the moment, the problem of using EU experience within the framework of the Eurasian integration project needs to be critically analyzed in order to avoid EU mistakes and take into account the peculiarities of the modern world order. Further development of the EAEU can and should be based on the use of EU legal experience. However, such use should be selective and focused mainly on substantive law.

References

European Union Law (C. Barnard & S. Peers (eds.), 2nd ed., Oxford: Oxford University Press, 2017). <https://doi.org/10.1093/he/9780198789130.001.0001>

Habermas J. *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23(2) *European Journal of International Law* 335 (2012). <https://doi.org/10.1093/ejil/chs019>

Hartley T.C. *The Foundations of European Union Law* (7th ed., Oxford: Oxford University Press, 2010). <https://doi.org/10.1093/he/9780199566754.001.0001>

Klabbers J. *Sui Generis? The European Union as an International Organization in A Companion to European Union Law and International Law* 1 (D. Patterson & A. Södersten (eds.), Oxford; Malden: Wiley-Blackwell, 2016). <https://doi.org/10.1002/9781119037712.ch1>

Klamert M. *The Autonomy of the EU (and of EU Law): Through the Kaleidoscope*, 42(6) *European Law Review* 815 (2017).

Lavenex S. *"Failing Forward" Towards Which Europe? Organized Hypocrisy in the Common European Asylum System*, 56(5) *JCMS: Journal of Common Market Studies* 1195 (2018). <https://doi.org/10.1111/jcms.12739>

Murray P. & Longo M. *Europe's Wicked Legitimacy Crisis: The Case of Refugees*, 40(4) *Journal of European Integration* 411 (2018). <https://doi.org/10.1080/07036337.2018.1436543>

Sangiovanni A. *Solidarity in the European Union*, 33(2) *Oxford Journal of Legal Studies* 213 (2013). <https://doi.org/10.1093/ojls/gqs033>

Information about the authors

Mark Entin (Moscow, Russia) – Professor, Head of EU Law Department, MGIMO University (76 Vernadskogo Av., Moscow, 119454, Russia; e-mail: entinmark@gmail.com).

Vadim Voynikov (Kaliningrad, Russia) – Associate Professor, Department of International and EU Law, Immanuel Kant Baltic State University (14 Aleksandra Nevskogo St., Kaliningrad, 236016, Russia; e-mail: VaVoinikov@kantiana.ru).